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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	**IB Docket No. 97-142**

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its reply to certain comments on the Order and Notice of Proposed Rulemaking ("NPRM"), FCC 97-195 (released June 4, 1997), in the above-captioned matter. In the NPRM, the Commission sought comment on whether the execution by the United States and 68 other countries of the World Trade Association ("WTO") Basic Telecom Agreement (the "WTO Agreement") warranted a modification of the Commission's existing rules governing foreign-affiliated carrier entry into the U.S. telecommunications market for basic telecommunications services. In so doing, the Commission proposed a number of modifications, including limiting

[1] A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets, including the international services market. Indeed, more than two-thirds of TRA's members currently provide international services.

the future application of the effective competitive opportunities ("ECO") and equivalency tests to applications from carriers associated with non-WTO Member countries. The Commission also tentatively concluded that, should it determine that application of the ECO test is no longer necessary in its review of Section 214 applications from carriers associated with WTO Member countries, such review would similarly no longer be applied to accounting rate flexibility requests.

In TRA's opinion, the time has not yet arrived for "a major shift in [the Commission's] philosophy for regulation of the international telecommunications market."[2] By advocating in their comments essentially the unfettered ability to enter the U.S. telecommunications market without delay, but refusing to step up to the commitment to bring settlement rates to or near cost, foreign and foreign-affiliated carriers aptly, albeit unintentionally, illustrate the continuing necessity of maintaining the safeguards presently afforded by the Commission's foreign entry rules, including the ECO and equivalency tests. TRA urges the Commission to proceed cautiously, and to relax foreign carrier entry rules only gradually in response to quantifiable evidence that the commitments made by WTO Member countries are actually resulting in the development of "market forces, which are more effective at deterring anticompetitive conduct than [foreign entry] rules would be."[3] Further, in view of the reluctance of many carriers to endorse the Commission's settlement rate benchmark proposals, TRA joins AT&T in urging the Commission to strengthen existing foreign entry rules to the extent necessary to preclude foreign and foreign-affiliated carriers from deriving anticompetitive

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[2] NPRM, FCC 97-195 at ¶ 6.

[3] Id. at ¶ 7.

advantages from participation in an open U.S. telecommunications market which is not yet equalled by correspondingly open foreign telecommunications markets. Such measures could include the imposition of increased reporting requirements, the disclosure of affiliate transactions and the maintenance of structural separation between carriers and their foreign carrier affiliates.

As the NPRM confirms, while moving closer to an open-entry policy designed to stimulate "new sources of competition, which will produce lower prices and greater service choice and innovation for American consumers,"[4] the Commission's commitment to "continue to exercise [its] authority to promote important public interest objectives"[5] remains strong. Thus, fully cognizant of the inherent risks to competition within the U.S. which the proposed modifications might engender, the Commission has determined to "allow entry into the U.S. international services market, as we do in the domestic interexchange market, *subject to safeguards designed to ensure that no competitor with market power can act in an anticompetitive manner.*"[6] Toward that end, the Commission also specifically proposed in the NPRM "a number of measures for detecting and deterring anticompetitive behavior,"[7] noting with particularity that

> our settlement rate benchmark proposals would greatly reduce the opportunity and incentive for anticompetitive conduct by significantly reducing the extent to which settlement payments U.S. carriers pay their foreign correspondents exceed the cost the foreign carriers incur to terminate calls.[8]

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[4] Id. at ¶ 6.

[5] Id. at ¶ 5.

[6] Id. at ¶ 6. (emphasis added)

[7] Id. at ¶ 9.

[8] Id. at ¶ 8.

The comments submitted by the majority of commenters in the proceeding, foreign carriers and carriers with foreign affiliations alike, bear out the TRA's misgivings concerning an immediate, rather than a graduated, relaxation of foreign entry requirements linked to no extrinsic showing that "the new competitive environment that will prevail in the future"[9] indeed has begun to emerge. While the United States Trade Representative, the Federal Bureau of Investigation and the Secretary of Defense understandably urge the Commission to "accord deference to the Executive Branch as set out in the *Foreign Carrier Entry Order*"[10] and "strongly object to the proposed new 'strong presumption' standard"[11] in favor of grant of authority, stressing that the Commission's proposed relaxation of foreign entry rules must be allowed to compromise neither trade policy issues nor national security and law enforcement concerns, virtually all other commenters criticize the Commission for proposing to retain even the most rudimentary oversight mechanisms. These commenters urge, among other things, the elimination of all indirect or direct foreign ownership limitations,[12] the abolition of a public interest review by the Commission,[13] and

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[9] Id. at ¶ 12.

[10] Comments of United States Trade Representative at 4.

[11] Comments of the Federal Bureau of Investigation ("FBI") at 1; Comments of the Secretary of Defense at 3-4.

[12] Comments of Nextwave Personal Communications Inc. at 3; Comments of Winstar Communications, Inc. at 4; Comments of Societe Internationale de Telecommunications Aeronautiques at 13; Comments of Pacific Communications Services Co., Ltd. at 2; Comments of Telephone and Data Systems, Inc. at 3; Comments of U S West, Inc. at 6; Comments of Telecom Finland, Ltd. at 6. Contrast with Comments of FBI at 10 (Commission must review any increase in foreign ownership by a licensee that already has more than 25% foreign ownership.)

[13] Comments of GTE Service Corporation at 15-17; Comments of France Telecom at 5; Comments of Nippon Telegraph and Telephone Corporation at 2; Comments of Deutsche Telekom AG and Deutsche Telekom, Inc. at 2.

the lifting of joint marketing restrictions.[14] It is further suggested that the Commission should abrogate its long-standing prohibition against special concessions in situations where a country permits international facilities competition[15] and that foreign entry cannot be conditioned upon carrier compliance with benchmark accounting rates.[16]

TRA agrees with the Commission that the WTO Agreement holds the potential to eventually increase the competitive nature of international service provision. It is unlikely, however, that the WTO Agreement will "alter fundamentally the competitive landscape for telecommunications services"[17] in the foreseeable future. As FaciliCom International, L.L.C., points out, "[a]ssuming that WTO members honor their WTO commitments, competitive market forces will eliminate the need for the FCC to apply the effective competitive opportunities ("ECO") test as a tool to open foreign markets."[18] TRA does not doubt the veracity or intentions of WTO Member countries. Indeed, the mere execution of the WTO Agreement constitutes a

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[14] Comments of Cable & Wireless, Plc. at 9. ("[A]s long as a dominant carrier makes fundamental network components and services available to all on a fair, reasonable and nondiscriminatory basis . . . the existence of exclusive arrangements with respect to other facilities and services should not be a concern.")

[15] Comments of BT North America at 5. (" Carriers affiliated with operators in countries that permit international facilities competition should not be subjected to special concessions conditions. Under this approach, the FCC need not determine whether a foreign affiliate of an applicant is dominant.")

[16] Comments of Telecommunications Authority of Singapore at 3; Comments of Kokusai Denshin Denwa at 9; Comments of Telefonos de Mexico, S.A. DE C.V. at 7; Comments of Government of Japan at 3-4. By Report No. IN 97-24, FCC No. 97-280, IB Docket No. 96-261, adopted August 7, 1997, the Commission adopted the proposed International Settlement Rate Benchmarks. The adoption of these benchmarks, which are not premised upon bringing settlement rates to cost, neither negates or minimizes the ability of foreign and foreign-affiliated carriers to engage in one-way bypass activities.

[17] NPRM, FCC 97-195 at ¶ 2.

[18] Comments of FaciliCom International, L.L.C., at 1.

major step toward the eventual development of a more fully competitive global telecommunications market. It is indisputable, however, that even with the best of intentions and the most concerted deployment efforts, the sweeping changes envisioned by the WTO Agreement cannot be accomplished overnight. As AT&T points out, only 20 countries which have executed the WTO Agreement have made commitments similar in scope to the showing required under the ECO test. Furthermore, "[t]aking account of the additional countries committing to open their markets on a delayed basis, 25 countries would meet ECO requirements by 2000, and 39 countries would do so in total *by the time all WTO commitments are effective in 2013.*"[19]

While TRA does not necessarily share Ameritech's view that "after-the-fact sanctions cannot be effective in 'encouraging' foreign governments to do anything,"[20] TRA agrees with Ameritech that the most effective safeguards are those which precede grant of authority. Toward that end, TRA concurs with AT&T and WorldCom that reducing the safeguards currently afforded by the foreign entry rules would be premature. Indeed, TRA agrees with WorldCom that "[i]t is imperative that the Commission retain unquestioned authority to examine relevant public interest factors on a case-by-case basis".[21] No less important will be the Commission's continued ability "to respond to the potential for anticompetitive harm raised by a foreign affiliate where the foreign carrier's home country has made no market liberalization commitment, only a weak commitment, or has failed to comply with its liberalization schedule."[22]

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[19] Comments of AT&T at 8-9. (emphasis added)

[20] Comments of Ameritech at 4.

[21] Comments of WorldCom, Inc., at i.

[22] Id.

Consistent with this view, TRA urges the Commission to supplement its current pre-entry safeguards with bolstered post-entry review mechanisms to ensure that U.S. carriers are not unduly disadvantaged during that period of time necessary for foreign telecommunications markets to achieve a state of openness in keeping with the commitments undertaken by WTO members. Strengthening the reporting obligations of foreign and foreign-affiliated carriers will aid this process tremendously. As the Commission has noted, "quarterly traffic and revenue reports help enable us to detect and deter anticompetitive conduct. In particular, they assist us in detecting deviations from expected traffic flows."[23] The Commission has further identified the value of continued recordkeeping obligations, holding that

> the potential for undue discrimination in the provisioning and maintenance of foreign facilities and services by a foreign carrier with market power in favor of an affiliated U.S. carrier presents a substantial risk to competition in the U.S. international services market . . . this requirement [to maintain records on the provisioning and maintenance of basic network facilities and services procured from the foreign carrier affiliate] serves as a valuable deterrent to discriminatory behavior and can serve as evidence of such behavior in the event we find it necessary to undertaken an investigation and possible enforcement action.[24]

TRA thus urges the Commission to adopt the proposal of AT&T that U.S. affiliates of foreign carriers submit reports on a monthly basis for Commission review, detailing, among other things, all "prices, terms and conditions of all products and services provided by its affiliated foreign carrier, including copies of all agreements, settlement rates and the methodology for proportionate return."[25] Such information will assist the Commission in its efforts to detect and deter

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[23] NPRM, FCC 97-195 at ¶ 98.

[24] Id. at ¶ 103.

[25] Comments of AT&T Corp. at 50.

anticompetitive behavior under its current rules and, in the event the Commission ultimately determines to relax those rules, will be essential to the Commission's continued ability to identify, let alone counteract, anticompetitive behavior.

TRA strongly supports the requirement that all affiliated transactions must be publicly disclosed and further urges the Commission to insist that affiliates "be required to operate as a distinct entity . . . to maintain separate accounting systems and records identifying all payments and transfers from the foreign carrier and to receive no subsidy from the foreign carrier or any investment or payment not recorded as an investment in debt or equity."[26] A structural separation requirement as set forth above, far from unduly burdening affiliates and their associated foreign carriers, will merely ensure that affiliated entities enjoy no economic advantages which are unavailable to U.S. carriers possessing no foreign affiliations.

As the United States Trade Representative has noted,

> the United States maintains the right under GATS to determine whether a proposed service will serve the public interest . . . a critical factor in such an analysis is the impact the proposed service will have on competition in U.S markets. The Commission has long applied such an analysis to U.S. telecommunications companies and we expect the Commission to apply a similar analysis to foreign entrants.[27]

TRA respectfully submits that the most expeditious means of effectuating such a public interest determination, and of minimizing the likelihood of anticompetitive behavior post-grant of entry into the U.S. telecommunications market, is the retention of the Commission's current foreign

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[26] Id. at 51.

[27] Comments of United States Trade Representative at 3.

entry rules, coupled with the adoption of the additional reporting and other safeguards discussed above.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to maintain the effectiveness of the foreign entry rules as currently formulated and to supplement those rules with additional safeguards consistent with the above comments.

Respectfully submitted,

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